

Compassionate Release in the Time of COVID

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Compassionate releases from jail and prison sentences have been [on the rise](#)¹ as COVID-19 cases devastate the incarcerated population. In early February, the [Sixth Circuit ruled](#) that the restrictions on compassionate releases are much lighter than district courts assumed.

In *United States v. Sherwood*, the Sixth Circuit ruled that district courts cannot deny requests for COVID-related compassionate release solely on the basis that the inmate remains a danger to the community.² In considering the case, the Court offers important insight into how district courts should analyze requests for compassionate release.

A quick rundown of the governing statutes may be helpful. Petitions for compassionate release are subject to review under 18 U.S.C. § 3582(c)(1)(A), which lays out criteria for deciding if a reduction of a term of imprisonment is appropriate.³ Such petitions must also pass muster under 18 U.S.C. § 3553(a), which outlines factors for courts to consider in their determination.⁴ Until recently, courts could deny petitions for compassionate release if the petitioner posed a danger to the community, as articulated in U.S.S.G. § 1b1.13(2).⁵

Scott Eric Sherwood, incarcerated for child pornography charges, appealed the denial of his motion seeking compassionate release under 18 U.S.C. § 3582(c)(1)(A). This provision states that the court may modify a term of imprisonment if the reduction is consistent with relevant policy statements issued by the Sentencing Commission, and “extraordinary and compelling reasons warrant such a reduction.”⁶ In response to Sherwood’s appeal, the government relied on policy language limiting the court’s discretion in reducing a sentence to cases in which the defendant does not pose a danger to his community.⁷

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¹Clare Hymes, *Compassionate release, once seldom used, offers some federal inmates hope*, CBS NEWS (Sept. 18, 2020, 4:00 PM), <https://www.cbsnews.com/news/compassionate-release-federal-inmates-covid-19/> [<https://perma.cc/H66X-4RMD>].

²*United States v. Sherwood*, No. 20-4085 (6th Cir. Feb. 2, 2021) [<https://perma.cc/P3DE-YLD5>].

³18 U.S.C. § 3582(c)(1)(A).

⁴18 U.S.C. § 3553(a).

⁵U.S.S.G. § 1b1.13(2).

⁶*Id.* Alternatively, the statute also allows compassionate release if, in addition to meeting the policy condition, the individual in question is at least 70 years of age and has served more than 30 years in prison. Because the court found that Sherwood satisfied the “extraordinary and compelling reason” element, it did not examine the age condition.

⁷U.S.S.G. § 1b1.13(2).

The government conceded that Sherwood's medical conditions (not specified in the decision) satisfied the "extraordinary and compelling reason" standard.⁸ But reduction of imprisonment is also subject to review under 18 U.S.C. § 3553(a), which outlines a series of factors for imposition of a sentence, namely: the nature and circumstances of the offense and the history and characteristics of the defendant, the need for the sentence imposed, the desire for consistency in sentencing, and the need to provide restitution to victims of the offense.⁹ The statute also reiterates the need to conform to policy standards.¹⁰

In denying Sherwood's request for compassionate release, the district court relied exclusively on U.S.S.G. § 1b1.13(2).¹¹ The district court ruled that the continued danger Sherwood posed to his community was sufficient to keep him behind bars, regardless of his age and medical conditions.¹² This decision constituted an abuse of discretion.¹³ [Earlier this year](#), the Sixth Circuit did away with the § 1b1.13(2) requirement in considerations of compassionate release.¹⁴ It clarified that in such cases, district courts need only consider two questions: first, whether extraordinary and compelling circumstances exist; and second, whether the applicable § 3553(a) factors warrant a reduction of imprisonment.¹⁵ The court summarized: "[T]he policy statement's requirement that the defendant not be a danger to the community no longer provides an independent basis for denying compassionate release."¹⁶ The Sixth Circuit remanded the case so that the district court can perform the § 3553(a) analysis and determine if the factors weigh in favor of Sherwood's release.

Sherwood is just one in a slew of recent Sixth Circuit opinions articulating how district courts should analyze requests for compassionate relief.¹⁷ Such requests—once a rarity—have skyrocketed as COVID-19 has swept the country and ravaged prison populations.¹⁸ The Senate and then-President Trump's laid the groundwork for an uptick in compassionate releases by making it easier for defendants to get their requests into court.¹⁹

⁸ *Sherwood*, No. 20-4085, at 2.

⁹ 18 U.S.C. § 3553(a).

¹⁰ *Id.*

¹¹ *Sherwood*, No. 20-4085 at 2.

¹² *Id.*

¹³ *Id.*, at 3.

¹⁴ *United States v. Montero*, No. 20-3666 (6th Cir. Feb. 5, 2021) [<https://perma.cc/D39L-H36X>].

¹⁵ *Montero*, No. 20-3666, at 2.

¹⁶ *Sherwood*, No. 20-4085, at 3.

¹⁷ See *United States v. Ruffin*, 978 F.3d 1000, 1006–07 (6th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1106 (6th Cir. 2020); *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021); *United States v. Hampton*, N. 20-3649, 2021 WL 164831, at *1–2 (6th Cir. Jan 19, 2021).

¹⁸ Hymes, *supra* note 1.

¹⁹ *Compassionate Release and the First Step Act: Then and Now*, FAMILIES AGAINST MANDATORY MINIMUMS,

In Sherwood's case, the term "compassionate release" can be difficult to swallow—Sherwood has been convicted of possession and transportation of child pornography.²⁰ But compassionate release relies on the weight of various factors, not a moral judgment of who deserves to reenter the community. The pandemic has [made prison sentences deadlier](#),²¹ and we must consider the policy rationale behind keeping sick and elderly prisoners locked up and at risk of death—a sentence not given to them by the courts, but by circumstance. "[Covid was the spark](#) that made compassionate release a reality and forced us to think about old and sick prisoners and the fate that awaited them if they went to prison," said George Washington University Law School professor Jessica Steinberg.²² "It forced us to take stock of the humanitarian crisis unfolding in our prisons."²³

The COVID-19 pandemic has created an opportune backdrop for those applying for compassionate release: circumstances that heighten the risk of developing serious illnesses for incarcerated people with underlying medical conditions. Kevin Ring, the president of Families Against Mandatory Minimums, called the virus a "humanitarian emergency" and said that it was "downright immoral" to trap sick and elderly people in prison once the pandemic hit.²⁴

Compounding the issue is the uncertainty as to when prisoners will be eligible for the vaccine, as [one district court in the Seventh Circuit noted](#) in December of 2020.²⁵ Vaccine rollouts are underway across the country, but [prisoners could still be among the last to be eligible](#).²⁶ That possibility is particularly sobering because prisons are hotspots for the virus, with some states reporting prison mortality rates seven times as high as in the general population.²⁷ One prisoner, who was recently released after 37 years behind

<https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf> [<https://perma.cc/NP8U-E9RW>].

²⁰ Sherwood, No. 20-4085, at 2.

²¹ Madeleine Carlisle & Josiah Bates, *With Over 275,000 Infections and 1,700 Deaths, COVID-19 has Devastated the U.S. Prison and Jail Population*, TIME (Dec. 28, 2020), <https://time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines/> [<https://perma.cc/7KFJ-S8L2>].

²² Ann E. Marimow, *Sick, elderly prisoners are at risk for covid-19. A new D.C. law makes it easier for them to seek early release*, WASH. POST (Dec. 30, 2020, 11:00 AM), <https://www.washingtonpost.com/local/legal-issues/sick-elderly-inmates-coronavirus-release/2020/12/29/5342816c-3fcd-11eb-8db8-395dedaaa036story.html> [<https://perma.cc/4QFP-8VER>].

²³ *Id.*

²⁴ Hymes, *supra* note 1.

²⁵ United States v. Brown, No. 06-CR-327, 2020 WL 7401617, at *7 (E.D. Wis. Dec. 17, 2020) [<https://perma.cc/2XSV-6K5Y>].

²⁶ Kiran Misra, 'A death sentence': US prisons could receive Covid vaccines last despite being hotspots, THE GUARDIAN (Feb. 9, 2021), <https://www.theguardian.com/us-news/2021/feb/09/us-jails-prisons-covid-vaccines> [<https://perma.cc/X5HG-CVPC>].

²⁷ *Id.*

bars, said that “being incarcerated can be a death sentence” in these circumstances.²⁸

And for those who feel that the punishment fits the crime, it is worth considering that outbreaks in jails and prisons have contributed to half a million additional cases of COVID-19 in surrounding areas—and that’s from May to August of 2020 alone.²⁹ The new standard comes in answer to this unprecedented plight. Courts must only find that extraordinary and compelling circumstances exist and that 18 U.S.C. § 3553(a) factors weigh in favor of compassionate release.³⁰ This more relaxed compassionate relief standard is not a get-out-of-jail-free-card for prisoners, but rather a necessary response to a devastating humanitarian crisis.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Montero*, No. 20-3666, at 2.